No. —— File No.——

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

WHITNEY LAYTON, Plaintiff in Error.

vs.

STATE OF MISSOURI, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF OF DEFENDANT IN ERROR.

I.

The assignment of error in this case is that the Missouri Statute under consideration is in contravention of article 14 of the amendments to the Constitution of the United States which provides that no State shall deprive any person of life, liberty or property without due process of law, and it is contended that the Missouri Supreme Court erred in holding that the said statute did not conflict with the fourteenth amendment to the Constitution of the United States.

II.

The statute in question does not conflict with the fourteenth amendment to the Constitution of the United States. It does not deny to any person the equal protection of the laws; nor does it conflict with any other provision of the Constitution of the United States or of the Constitution of Missouri. There is in this case no question or subject of foreign or interstate commerce.

Mugler vs. Kansas, 123 U. S. 623.

Powell vs. Pennsylvania, 127 U. S. 678.

Plumley vs. Massachusetts, 155 U. S. 461.

Schollenberger vs. Pennsylvania, 171 U. S. 1-16.

Barnet vs. Atlantic Railway Co., 68 Mo. 56.

State vs. Bockstruck, 136 Mo. 335.

Butchers Union Company vs. Crescent City Company, 111 U. S. 746, 750, 753.

III.

The subject of this legislation, the public health, and the prevention of the adulteration of food, is peculiarly within the power and protection of the Legislature. So long as the Legislature does not clearly exceed constitutional limitation its *fiat* on that subject is law, however unwise, unjust or hurtful its enactments may seem to the courts and the people. The enactment of the statute under consideration was a valid exercise of the police power of the State conferred by the constitution upon the Legislature.

Amer. & English Encyclo. of Law (First Ed.), Vol. 18, page 748, title "Police Power."

Idem (2nd Ed.), Vol. 1, page 739 *et seq.* title "Adulteration."

Commonwealth vs. Huntley, 156 Mass. 236.

State vs. Smyth, 14 R. I. 100.

State vs. Campbell, 64 N. H. 402.

Commonwealth vs. Waite, 11th Allen, 264.

Cooley Const. Lim. (5th Ed.), top p. 207.

Idem., 206.

Edwards vs. Lesueur, 132 Mo. 410, 430.

State ex rel vs. Pond, 93 Mo. 606, 619.

Powell vs. Pennsylvania, 127 U. S. 678, 684.

Powell vs. Commonwealth, 114 Penn. St. 265, 292-3.

Thorpe vs. Rutland, etc., R. R. Co., 27 Vt. 140.

State vs. Addington, 77 Mo. 110.

s. c., 12 Mo. App. 214.

Commonwealth vs. Alger, 7 Cush. 53, 84.

IV.

This statute does not deny or impair the right of any person to life, liberty or the enjoyment of the gains of his own industry within the meaning of section 4 of article II of the constitution of Missouri, nor does it deprive any person of life, liberty or property without due process of law within the meaning of section 30 of that article. The constitution does not guarantee or give to any person the right to manufacture or sell for food any chemical or substance which the Legislature has declared to be unhealthy and has forbidden. The fact that appellant and many other persons were at the time of the enactment of this statute, and had been long theretofore, engaged in the business of such manufacture and sale, and the further fact that this statute inhibited the further prosecution of that business, do not constitute a deprivation of liberty or property or the enjoyment of the gains of one's own industry within the meaning of the constitution. The case of State vs. Addington, 77 Mo. 110, involved every essential feature of the case at bar. What was

said by this Court in that case and by the St. Louis Court of Appeals, whose opinion this Court approved, applies here with greater force, perhaps, than to that case, because in that case there was no declaration of the Legislature that the inhibited article of food was in itself unhealthy or injurious.

In the case at bar the Legislature in the title of its act has declared the inhibited articles to be unhealthy. In the Addington case this Court approved the exclusion of evidence offered by defendant to show that the compound sold by him was in all respects as healthful and nutritious as pure butter, and was no more liable to adulteration or deception than pure butter, and was, from a sanitary point of view, in all respects as harmless and desirable a commodity as pure dairy butter. The facts so sought to be proved by Addington were were not inconsistent with any express declaration of the Legislature in the statute under which he was convicted, while all the evidence offered by defendant in the present case tended to prove, and was offered to prove, the healthfulness of a substance which the Legislature has declared to be unhealthful.

The Court of Appeals in that case, referring to the contention of Addington, that the statute under which he was prosecuted infringed section 4 of article II of the constitution which declares "that all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry" said (page 218): "It is too plain for discussion that such a general declaration of right cannot be strained into a prohibition against the Legislature from suppressing the manufacture and sale of a particular article of food. We must obviously look further than this for some constitutional inhibition against the statute in question. Such an inhibition is supposed by the learned counsel for defendant to be found in the provision of the constitution, which declares that "no person shall be deprived of life, liberty or property without due process of law."

The Court held that there was nothing in that point, because there, as may be said in the present case, it appeared

from the evidence that the article for sale of which defendant was prosecuted was manufactured after the statute took effect.

But appellant's counsel still contends that the statute here in question, inasmuch as it deprived appellant of the right to continue his established business of manufacturing and selling for food baking powders containing alum deprived him of liberty or property within the meaning of the constitution (article II, section 30), or deprived him of the enjoyment of the gains of his own industry within the meaning of section 4 of that article. A contention like this was made by defendant and denied by the Court in Addington's case. The St. Louis Court of Appeals, per Thompson, J., (page 227), said: "The industry of counsel for defendant has not been able to refer us to any case in which the law of the State prohibiting the manufacture and sale of an article intended as human food has been declared unconstitutional."

The right to do and continue to do business in the manufacture and traffic of an article of food or drink is not a liberty or property within the meaning of section 4 or section 30 of article II of the constitution. Section 30 is identical with that provision of section 1 of the Fourteenth amendment to the constitution of the United States, which prohibits the states from depriving any person of life, liberty or property without due process of law. The Supreme Court of the United States has repeatedly held that the enactment by a State Legislature of a statute for protection of the public health and welfare which forbids the manufacture and sale of any article or commodity for food or drink does not deprive those persons who before the enactment were engaged in such manufacture or sale of liberty or of property within the meaning of the Fourteenth amendment.

In the case of Mugler vs. Kansas, 123 U. S. 623, Mugler had for many years been engaged in the business of manufacturing and selling beer. He had, at great expense, erected and furnished a brewery, which was of little use or value, except for the manufacture of beer. While he was thus using

that property and was prosecuting the business of manufacturing and selling beer, the Legislature of Kansas, pursuant to a then recent change in the constitution of the state, passed an act prohibiting the manufacture and sale of spiritous, malt or other intoxicating liquors, except for medical, scientific and mechanical purposes. Mugler, disregarding that statute, continued the manufacture and sale of beer. For that he was indicted and convicted, and from the judgment of conviction he appealed to the Supreme Court of Kansas, where the judgment being affirmed, he appealed to the Supreme Court of the United States. In that court it was strenuously insisted for appellant that the enactment of the statute, cutting off as it did, Mugler's right to continue his business of manufacturing and selling beer was a deprivation of his liberty and property within the meaning of the Fourteenth amendment to the constitution. The case was exhaustively and ably argued by eminent counsel, and was most carefully considered by the Supreme Court of the United States, which held that the enactment and enforcement of the statute was not a violation of the Fourteenth amendment; that Mugler was not thereby deprived of liberty or property without due process of law. The Court, per Mr. Justice Harlan, said (page 657): "That legislation by a state prohibiting manufacture within her limits of intoxicating liquors, to be there sold or bartered, for a general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the constitution of the United States, is made clear by the decisions of this Court rendered before and since the adoption of the Fourteenth amendment." The learned judge then proceeds to cite and discuss a number of decisions of the Supreme Court, among them Beer Company vs. Massachusetts, 97 U. S. 25, 33, and Munn vs. Illinois, 94 U. S. 113, 124.

The Court said (p. 665): "The principle that no person shall be deprived of life, liberty or property without due process of law was embodied in substance in the constitutions of nearly all, if not all, of the states at the time of the adoption of the fourteenth amendment; and it has never been re-

garded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.

> Beer Company vs. Massachusetts, 97 U. S. 25, 32.
> Commonwealth vs. Alger, 7 Cush. 53."

Reference was also made in the opinion to the case Fertilizing Company vs. Hyde Park, 97 U. S. 659, 667, where the Court sustained the validity of an ordinance of the village of Hyde Park, passed under legislative authority, forbidding any person to transact the very business which the Fertilizing Company, at large expense and under authority expressly conferred by its charter, had long prior to the ordinance or legislative act established at a point in the village and where the charter of the village provided that it should not interfere with that business. The enforcement of the ordinance in question operated to destroy the business of the Fertilizing Company and seriously to impair the value of its property. Yet inasmuch as it appeared that the business of the Fertilizing Company had become a nuisance to the community, the Court maintained the authority of the village, acting under legislative sanction, to protect the public health against such nuisance. And referring to the police power of the State said (page 667): "It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another."

In the Mugler case the Court also said (page 668): "A prohibition simply upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals or safety of the community cannot in any just sense be deemed a taking or appropriation of property for the public benefit. * * * Nor can legislation of that character come within the Fourteenth amendment in any case, unless it is

apparent that its real object is not to protect the community or to promote the general well-being, but under the guise of police regulation to deprive the owner of his liberty and property without due process of law."

And the Court adopts the language of the Court in Beer Company vs. Massachusetts that "If the public safety or public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer."

In Beer Company vs. Mass., 97 U. S. 25, 32, the Beer Company had for a long time been engaged in the business of making and selling beer under express charter, power and authority given it in 1828, when in 1869 an act of the Legislature of Massachusetts was passed forbidding the manufacture and sale of beer. The Beer Company in disregard of this statute continued the manufacture and sale of beer, and for that offense was proceeded against, and the penalty denounced by the statute of 1869 was imposed upon it. Although the original act which gave to the Beer Company all its powers reserved to the State the right to alter or repeal the act, yet the Beer Company contended that its charter was a contract, the obligations of which could not be impaired by subsequent legislation. Upon appeal to the Supreme Court of Massachusetts that court held that the act of 1869 did not impair the obligations of the contract contained in the charter of the claimant so far as it related to the sale of malt liquors, but that that act was binding on the Beer Company to the same extent as on individuals. That court said: "The act is in the nature of a police regulation in regard to the sale of a certain article of property, and is applicable to the sale of such property by individuals and corporations, even where the charter of the corporation cannot be altered or repealed by the Legislature." The Supreme Court of Massachusetts affirmed the judgment of the trial court, and the Beer Company took the case by writ of error to the Supreme Court of the United States. That Court, per Mr. Justice Bradley, said

(page 32): "The plaintiff in error was incorporated for the purpose of manufacturing malt liquors in all their varieties, it is true; and the right to manufacture undoubtedly as the plaintiff's counsel contends included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State. * * * Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens and to the preservation of good order and the public morals. The Legislature cannot by any contract divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim *Salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself.

Boyd vs. Alabama, 94 U. S. 645."

Powell vs. Commonwealth, 114 Penn. St. 265, was one of a class known as oleomargarine cases. It involved substantially the same questions as did the Addington case in this State. The statute for violation of which Powell was prosecuted inhibited the manufacture out of any oleaginous substance or any compound of the same other than that pro-

duced from unadulterated milk, or of cream from the same any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from the same or the sale of any such compound. Powell was charged with and convicted of selling, as an article of food, an article designed to take the place of butter produced from pure unadulterated milk, or cream from milk, which said article it was charged and proved was manufactured out of certain oleaginous substances and compounds of the same other than that produced from unadulterated milk, or cream from milk, said article so sold bein an imitation butter. Powell appealed from the judgment of conviction to the Supreme Court of Pennsylvania. That Court followed the decision and rulings, as well as the opinion of this Court, and of the St. Louis Court of Appeals in the Addington case, in all essentials. At the trial below Powell offered to prove "that he is engaged in the grocery and provision business in the City of Harrisburg, and that the article sold by him was part of a large and valuable quantity manufactured prior to the 21st of May, 1885 (the date of the approval of the act), in accordance with the laws of this Commonwealth relative to the manufacture and sale of said article so sold by him, and that for the manufacture of said article large investments were made in the purchase of real estate, the erection of proper buildings and the purchase of the necessary machinery and ingredients; that in his traffic in the said article the defendant made large profits, and that if the said defendant should be prevented from trafficking in said article the value of his property engaged therein would be entirely lost, and he would be deprived of the means of livelihood" (p. 267). All this evidence was excluded by the Court below, and the Supreme Court of Pennsylvania approved that exclusion. Defendant also offered to prove that the article sold by him was a wholesome and nutritious article of food, in all respects as wholesome as butter produced from pure unadulterated milk, or cream from unadulterated milk. This evidence was also excluded and its exclusion was approved by the Supreme Court.

On appeal Powell raised the very question and made the very contention here under consideration, namely: "that the said act of assembly is intended to and actually does deprive the defendant and other citizens of the State of Pennsylvania who have made similar investments and engaged in similar business of their property without compensation and without any legal reason for such deprivation" (p. 268). Upon this point the Supreme Court of Pennsylvania said (pp. 292-3): "Nothing but a clear violation of the constitution—a clear usurpation of power prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void. We cannot try the constitutionality of a legislative act by the motives and designs of the law-makers however plainly expressed. If the act itself is within the scope of their authority, it must stand. These principles are necessary incidents of the law-making power. In creating a legislative department and conferring upon it the legislative power the people must be understood to have conferred the full and complete authority as it vests in and may be exercised by the sovereign power of any state, subject only to such restrictions as they have seen fit to impose, and to the limitations which are contained in the constitution of the United States. The legislative department is not made a special agency for the exercise of specially defined legislative powers, but is entrusted with the general authority to make laws at discretion.

Cooley Con. Lim., 87."

The Powell case was taken by writ of error from the Supreme Court of Pennsylvania to the Supreme Court of the United States (Powell vs. Pennsylvania, 127 U. S. 678), where the rulings and views of the Supreme Court of Pennsylvania were followed, and the judgment of that Court was affirmed. The Court, per Mr. Justice Harlan, said (p. 683): "This case in its important aspects is governed by the principles announced in Mugler vs. Kansas, 123 U. S. 623." Also

at page 685 the Court said: "Whether the manufacture of oleomargarine or imitation butter of the kind described in the statute is or may be conducted in such way, or with such skill and secrecy as to baffle ordinary inspection, or whether it involves such danger to the public health as to require for the protection of the people the entire suppression of the business rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients are questions of fact and of public policy which belong to the legislative department to determine. As it does not appear upon the face of the statute or from any facts of which the Court must take judicial cognizance, that it infringes rights secured by the fundamental law, that legislative determination of those questions is conclusive upon the Courts."

And again on page 686: "If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food their appeal must be to the Legislature or to the ballot box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

V.

It seems unnecessary to dwell upon the proposition advanced in appellant's brief under this head, that the Courts will take judicial cognizance of the fact there asserted that the trade of making and selling alum baking powders is a lawful business or that alum baking powder is a well recognized article of commerce of almost universal acceptance. That proposition refutes itself. As far as common knowledge or general information goes, no manufacturer or dealer puts alum baking powders on the market as such. The fact that alum is a constituent is generally, if not universally, concealed from consumers and from the public. Labels and markings of packages carefully omit the word "alum." The use of alum would generally be regarded an adulteration.

So far as common knowledge or general impression in the community goes, it seems safer to assert that there is a prejudice and suspicion generally prevalent against the use of alum in baking powders and in food generally.

The exclusion of defendant's evidence was not error. The ultimate fact sought to be established by that evidence was the unconstitutionality of this statute. The defendant having plainly violated the statute he was guilty of the charge laid against him, unless the statute is unconstitutional. Defendant sought to show by that evidence that the doing by him of the inhibited act was harmless; that he had a vested right to continue to do after the act took effect as he had theretofore done, and that the act in seeking to inhibit him had violated his constitutional rights. Touching the competency and relevancy of such evidence, Cooley in his work on Constitutional Limitations (5th Ed., top page 223) says: "If evidence was required, it must be supposed that it was before the Legislature when the act was passed; and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding. And although it has sometimes been urged that the Courts ought to inquire into the motives of the Legislature where fraud and corruption were alleged and annul their action if the allegation were established, the argument has in no case been acceded to by the judiciary and they have never allowed the inquiry to be entered upon. The reasons are the same here as those which preclude an inquiry into the motives of the Governor in the exercise of a discretion vested in him exclusively. He is responsible for his acts in such case, not to the Courts, but to the people." Most of this statement of the law was quoted and approved in United States vs. Des Moines, etc., Co., 142 U. S. 510, 544.

A question of the constitutionality of a statute is purely a question of law. It must be tried by the Court, not by a jury, and hence evidence such as was tendered here is out of the question. The impropriety, not to say absurdity, of

admitting evidence of disputed matters *in pais* to determine the constitutionality or unconstitutionality of an act of the Legislature was pointed out by this Court in State vs. Rich, 20 Mo. 393, 397, where the Court says: "It would, indeed be impracticable to act upon any such principle. If whenever any act done under the authority of the law came in question collaterally, the constitutionality of the act could be contested, then the trial of the main issue must necessarily be delayed until the preliminary fact upon which the validity of the contested legislative act depended should be first tried and determined upon testimony which, being different in different cases, might involve the absurdity of deciding the law constitutional one day and unconstitutional the next."

This subject was treated in State vs. Campbell, 64 N. H. 402, where Campbell was convicted of violation of a statute of New Hampshire which prohibited the sale of adulterated milk or milk to which water or any foreign substances had been added. That statute provided that in all prosecutions under it, milk containing more than eighty-seven per cent of watery fluid or less than thirteen per cent of milk solids should be deemed, for the purpose of that statute, adulterated milk. Defendant offered to show that the pure natural milk from his cows contained less than thirteen per cent of milk solids. The Supreme Court of New Hampshire held that that evidence was properly excluded, because the only purpose it could subserve would be to prove that the statute was unconstitutional in forbidding defendant to sell pure natural milk. The Court cited the case of People vs. Chipperly, 101 N. Y. 634, and quotes with approval the following language of Learned, J., adopted by the Court of Appeals of New York in that case (37 Hun. 324): "But the defendant takes the broader ground that the Legislature cannot under the constitution prohibit the sale of milk drawn from healthy cows, which in its natural state falls below the standard fixed by the act, unless such milk or the article made from it is in fact unwholesome or dangerous to public health. How is that question of fact to be determined? The Court cannot

take judicial notice whether milk below the standard is or is not unwholesome or dangerous to public health. Is that to be a question for the jury? If so, the Court must charge a jury in each case that if they find milk below that standard to be unwholesome, then the statute is constitutional; if they find it to be wholesome, then the statute is unconstitutional. Evidently a constitutional question cannot be settled or rather unsettled that way. The constitution would vary with the varying judgments of juries. Either then the Legislature can under the constitution forbid the sale of milk below a certain standard, whether such milk be in fact wholesome or not; or else they cannot do this whether such milk be in fact wholesome or not. If they may fix a standard they must judge whether or not milk below that standard is wholesome. The Courts cannot review that judgment." This Court in State vs. Wiley, 109 Mo. 439, 443, reiterated what had been said in State vs. Rich, and held that where the constitutionality of an act of the Legislature depended upon the existence of an extrinsic fact, the Courts must presume that the Legislature in passing the act had found the existence of that fact, and that such finding would be conclusive upon the Court. And in the case *Ex parte* Renfrow, 112 Mo. 591, 595, speaking of the presumption that the Legislature had ascertained the existence of extrinsic facts sufficient to make the act constitutional, this Court said: "The only presumption we can indulge in regard to their action is, that they did their duty, duly inquired into and upon evidence satisfactory to themselves, ascertained that Green county had at the time the population required by the constitution. What that evidence was we do not know, have no way of ascertaining, and are not at liberty to inquire."

VI.

The enactment of this statute was a valid exercise of the police power of the State confided by the Constitution to the Legislature.

For the purposes of this case the statute does not touch or seek to affect any property in existence when it took effect. The information charges and the proofs show that appellant manufactured the forbidden article after that date.

There is in this case no subject or question of foreign or interstate commerce. It was charged and proved that appellant, doing business in Missouri, manufactured the alum baking powder in question at St. Louis and sold it to a firm doing business at St. Louis. (Schollenberger vs. Pennsylvania, 171 U. S. 1, 16.)

The consideration of the question whether this statute is unconstitutional must start with the assumption that *prima facie* it is constitutional.

> Cooley Const. Lim. (5th Ed.), top page 207.
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> Edwards vs. Lesueur, 132 Mo. 410, 430.
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> State ex rel. vs. Pond, 93 Mo. 606, 619.

"Every possible presumption is in favor of the validity of a statute, and this continues till the contrary is shown beyond a rational doubt."

> Powell vs. Penn., 127 U. S. 678, 684.

"Nothing but a clear violation of the Constitution—a clear usurpation of power prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void."

> Powell vs. Commonwealth, 114 Penn. St. 265,292-3.

"The right of the judiciary to declare a statute void and to arrest its execution is one which in the opinion of all

courts is coupled with responsibilities so grave that it is never to be exercised, except in very clear cases; one department of the government is bound to presume that another has acted rightly. The party who wishes us to pronounce a law unconstitutional takes upon himself the burden of proving beyond doubt that it is so."

State vs. Addington, 77 Mo. 110, 117-118.

"Nor can a court declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution."

Cooley Const. Lim. (5th Ed.), top page 197-8.

All the legislative power of the State of Missouri, subject only to the limitations contained in the Constitution, is vested in the General Assembly. (Constitution, Article IV, Section 1.) Thus, as was said by the Supreme Court of Pennsylvania in Powell vs. Commonwealth, cited above, where it quotes the language of Judge Cooley: "The legislative department is not made a special agency for the exercise of specially defined legislative powers, but it is entrusted with the general authority to make laws at discretion, subject only to such limitations as are contained in the Constitution of the State and the Constitution of the United States." Among the powers universally conceded to belong to the Legislature are those which are called police powers. Judge Cooley says (Const. Lim. 706): "The police power of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the State, but also to establish, for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated

to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others." That learned author (page 707) said: "No definition of the power can be more complete and satisfactory than some which have been given by eminent jurists in deciding cases which have arisen from its exercise and which have been so often approved and adopted that to present them in any other than the language of the justices would be unwise, if not inexcusable. Says Chief Justice Shaw (Commonwealth vs. Alger, 7 Cush. 53, 84): 'We think it a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth is * * * held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations, established by law, as the Legislature, under the governing and controlling power vested in them by the Constitution may think necessary and expedient. * * * The power we allude to is rather the police power; the power vested in the Legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries or prescribe limits to its exercise.'"

And on page 708, quoting Chief Justice Redfield in Thorpe vs. Rutland, etc., R. R. Co., 27 Vt. 140, Judge Cooley says: "This police power of the state extends to the protection of the lives, limbs, health, comfort and quiet of all

persons, and the protection of all property within the state; according to the maxim *sic utere tuo ut alienum non laedas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others. * * * By this general police power of the State, persons and property are subject to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State; of the perfect right in the Legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned."

Speaking of the powers of the Legislature to enact laws for "the protection of the public health, or to prevent the adulteration of articles of food, as well as imposition or fraud in the sale of such articles," the Supreme Court of Pennsylvania, in the case of Powell vs. Commonwealth, cited above, said (page 293): "In the absence of any constitutional inhibition or limitation, the sovereign power of the state to enact laws for the public good appears to embrace these subjects of legislation; but however that may be, they come fairly within the police powers of the state." And that Court then quotes and approves the foregoing language of Judge Redfield in Thorpe vs. R. R. Company.

Judge Cooley says: "The accepted theory upon this subject appears to be this: In every sovereign state there resides an absolute and uncontrolled power of legislation. In Great Britain this complete power rests in the Parliament; in the American states it resides in the people themselves as an organized body politic. But the people by creating the Constitution of the United States have delegated this power, as to certain subjects and under certain restrictions, to the Congress of the Union; and that portion they cannot resume, except as it may be done through amendment of the national Constitution. For the exercise of the legislative power, subject to this limitation, they create by their state constitution a legislative department, upon which they confer it; and granting it in general terms, they must be understood to grant the

whole legislative power which they possessed, except so far as at the same time they saw fit to impose restrictions. While, therefore, the Parliament of Britain possesses completely the absolute and uncontrolled power of legislation, the legislative bodies of the American states possess the same power, except, first, as it may have been limited by the Constitution of the United States; and, second, as it may have been limited by the Constitution of the State. A legislative act cannot, therefore, be declared void, unless its conflict with one of these two instruments can be pointed out."

Cooley Const. Lim. (5th Ed.), top page 206.

Appellant has not pointed out any specific inhibition or limitation of the Constitution which is violated or exceeded by this statute. The statute in its title and its body purports to be an enactment for the protection of the public health, and more particularly for the prevention of the adulteration of food. Legislation on those subjects and the regulation of those matters are everywhere conceded to be within the police power of the General Assembly. The regulation and control of them are so obligatory upon the Legislature that it cannot by any act or contract divest itself of the power to regulate them.

Butchers' Union, etc., Company vs. Crescent City, etc., Company, 111 U. S. 746, 750-3.

The learned counsel for appellant seem to concede this proposition in general terms, but they contend in their brief that the subject indicated in the title of this bill, namely: the prevention of the use of unhealthy chemicals or substances for food, is not the real subject of the bill; or that if that be not so, then the Legislature was insincere and under pretense of legislating for the public health, aimed its enactment at appellant and others engaged in like business with him, and really intended only to break up that business. The arguments of appellant's brief go not to the power or authority

of the Legislature to inhibit the use of unhealthy chemicals or substances in the manufacture and sale of food, but to the motive, the sincerity or the judgment or the justice or the reasonableness of the Legislature in including alum in the list of unhealthy chemicals or substances, and in making the provisions of the act so sweeping as to include inhibition of defendant's business, which counsel insist is of such enormous proportions, and is so harmless and beneficent that it is beyond the reach of legislative control.

Counsel go so far in their argument as to assert (page 17) that the framers of this bill were actuated by a "fraudulent purpose," and that the trade in alum baking powders was what was really and solely aimed at. Counsel say they "can easily trace in this record the malign influence which conceived this iniquitous and stealthy measure to the chief competitor of the traders in alum. And it was by reason of this influence the design was so disguised in the title that it could not be easily discovered and was not discovered by the thousands of our citizens who were engaged in the manufacture and sale of alum baking powders."

Whether this is intended to be a charge against the General Assembly of Missouri of iniquity and stealth, or of subservience to the dictates of iniquitous and stealthy "framers of the bill;" or of careless indifference to the contents of a bill passed by them, is not clear. Whatever is meant, the charge is out of place in this Court:

State ex rel. vs. Hays, 49 Mo. 604, 607.

Doyle vs. Continental Ins. Co., 94 U. S. 535, 541.

And moreover is absolutely without foundation in any fact proved or offered to be proved in this case. It is impossible to think the learned counsel for appellant believe the Court will pay any attention to such declaration.

Appellant's counsel cite the case of State vs. Marx, as authority for their contention that the Courts, and not the Legislature, are to be judges of the reasonableness of an act prohibiting the manufacture and sale for food of an article

containing chemicals; and that in the consideration and determination of that question the Court and not the Legislature is to decide whether the manufactured article containing the inhibited chemical is in fact, or is not in fact, harmless and wholesome for food. The decision of the Marx case is urged as authority here, where the Legislature has decided and declared inhibited chemical as a constituent of food preparations to be unhealthy. The Marx case differs from the case at bar in at least one radical feature, and that is that the Legislature of New York, in passing the act there in question, had made no declaration, expressly or by necessary implication, that oleomargarine as a food or in food is unhealthy or harmful, and possibly for that reason the Court felt at liberty to inquire.

In the Marx case the Court found that neither in the title nor the body did the New York statute contain anything indicating its purpose to be to prevent the adulteration or imitation of other food with oleomargarine; whence the Court held that the statute had no such purpose. As soon as that statute was altered, so as to prohibit oleomargarine "in imitation of butter," it was upheld in the Arensberg case.

This Court in State vs. Bockstruck, 136 Mo. 335, 357, considered both of those cases and disagreed, as it had already done in Addington's case, with the reasonings and conclusions of the New York Court of Appeals in Marx's case, both upon principle and weight of authority, saying: "The great preponderance of authority sustains the view announced in Addington's case, the theory of which was the right of the state in the exercise of its police power to forbid the manufacture or sale of articles which could readily be used for the purposes of deception, although, perhaps, not designed originally for that purpose."

The law in this state as declared by this Court in Addington's case and in Bockstruck's case, not to speak of other cases, is, that unless the Court can see from the face of the act in question that the Legislature has clearly transgressed a constitutional limitation, and has attempted to control or to deal with a subject matter excluded by the Constitution from

their interference, or has dealt with a subject constitutionally within their province, in a way forbidden by the Constitution, the Court will not make itself the judge of the reasonableness or justice of the provisions of the act, nor will it indulge inquiry about facts *in pais* which might, in the opinion of the Court, lead it to the conclusion that the statute is unjust, unwise or unreasonable.

Assuming that it is the province of the Legislature to protect the public health and to prevent the adulteration of food, it would not be difficult, were it necessary, to see that the statute here in controversy is a needful and wise protection of the public health. Limiting attention to the matter of alum, no one will say that alum is a natural food, or that it occurs as a constituent of any natural food, or that it is *per se* a healthy or safe diet. It is commonly known to be a chemical, a drug, an astringent. No one would wish to take it as food, or in his food habitually. It would naturally be assumed to be unhealthy when used in that way. It seems fair to say that no one desires alum in his food. This is matter of common knowledge, experience and observation, notwithstanding appellant's contention that many people are in fact in the habit of taking food that has been prepared with alum baking powders. If that contention is true it shows the need of legislative protection. It is matter of common experience and observation that people frequently eat they know not what. Their meat, bread, sugar, coffee, drinks, condiments, and a great variety of prepared foods are taken and consumed as being what they purport to be, pure and wholesome, and not adulterated with chemicals. Most of these foods have been prepared by the butcher, the baker or the manufacturer, upon the faith of whose honesty and professions as to purity and wholesomeness the people seem to rely. Consumers do not know and can rarely find out what are the real constituents or what has been the treatment by the manufacturer of prepared foods and food preparations. Can it be said that the manufacturer is always worthy of the confidence the people thus put in him? Is it not true of common knowledge that he concerns himself much more with his profits than with

the wholesomeness of his products? Does he not often use materials and adopt treatment of them because they are cheap, and disregard or pass lightly over the question of the health and welfare of the consumer, and does he not habitually conceal his methods as secrets of his trade? Is there not danger that he will, for cheapness' sake, use substances of a deleterious kind? In view of this helpless confidence of the public, and of the strong temptation of manufacturers and dealers in prepared foods to take advantage of it to their profit, it would seem that there is need of legislative regulation and restraint, and that in the exercise of that regulation and restraint the Legislature was wise in laying the axe at the root of the tree and prohibiting entirely the manufacture and sale for food or food preparation of compounds containing any one or more of the enumerated chemicals.

VII.

In the fact that this statute under the general designation of "unhealthy chemicals" includes alum with arsenic, calomel and bismuth, counsel for appellant finds evidence that "the protection of the public health was a mere pretense" of the Legislature; counsel asserting as a self-evident proposition, that arsenic, calomel and bismuth "never were and never could be used in the preparation of food." Possibly that fact was not known to the law-makers. Would not a fair-minded respect for the legislative department of the government suggest that perhaps the Legislature was not as well informed as the learned counsel assumes to be about the mysterious possibilities of industrial chemistry, and that in its solicitude to protect the people from danger, the Legislature went further in its inhibitions than a wisdom superior to theirs would have deemed it necessary to go.

VIII.

It is urged for appellant that this statute conflicts with that clause of the Fourteenth Amendment to the Constitution of the United States which provides "that no state shall deny to any person the equal protection of the laws." Counsel says:

"It is class legislation of the most vicious character." It is not obvious why the full answer to this objection does not lie in the language of Mr. Justice Harlan, in Powell vs. Pennsylvania, quoted by counsel here—"This statute places under the same restrictions all who manufacture or sell or offer for sale * * * the articles prohibited; thus recognizing the principle of equality among those engaged in the same business." Neither is it obvious wherein this statute makes any distinctions between classes or individuals, otherwise than must in the nature of the case occur in every penal statute, that is, separating into one class all persons who obey the statute, and into another class all those who violate it.

IX.

The constitutionality of a law is not to be determined upon the question of fact in each case, but the courts determine for themselves upon the principles of our Constitution which vested the legislative power in the general assembly, and the rule of construction adopted by our courts is that an act of the Legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt.

Commonwealth vs. Smith, 4 Bin. (Penn.) 117.
Cooley's Const. Limitations, 6 Ed. 216.
State vs. Nelson, 39 N. E. Rep., 22.

The cases abound in the greatest courts, state and federal, upon which this limitation has been set upon their own authority by the most eminent judges we have had.

Ogden vs. Saunders, 12 Wheat. 213.
Sinking Fund Cases, 99 U. S., 700.
In re Wellington et al., 16 Pick. 87.
Perry vs. Keene, 56 N. H. 514.

I respectfully submit that the judgment of the Supreme Court of the State of Missouri should be affirmed.

Edward C. Crow

Attorney-General of Missouri.

3003

No. —— File No.——

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

WHITNEY LAYTON, Plaintiff in Error.

vs.

STATE OF MISSOURI, Defendant in Error,

ON WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT AND ABSTRACT OF RECORD OF DEFENDANT IN ERROR.

Plaintiff in error was prosecuted for a violation of an act of the General Assembly of the State of Missouri, entitled "An Act to prevent the use of unhealthy chemicals or substances in the preparation or manufacture of any article used or to be used in the preparation of food," approved May 11, 1899 (Laws of Missouri, 1899, p. 170), which is as follows:

"Section 1. That it shall be unlawful for any person or corporation doing business in this State to manufacture, sell, or offer to sell, any article, compound or preparation for the purpose of being used, or which is intended to be used in the preparation of food, in which article, compound or preparation there is any arsenic, calomel, bismuth, ammonia or alum.

"Section 2. Any person or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor and shall, upon conviction, be fined not less than $100.00, which shall be paid into and become a part of the road fund of the county in which such fine is collected."

The defendant was prosecuted upon the following information:

"RICHARD M. JOHNSON, Assistant Prosecuting Attorney, of the St. Louis Court of Criminal Correction, now here in Court, on behalf of the State of Missouri, information makes as follows:

That Whitney Layton in the City of St. Louis, on the 28th day of August, 1899, then and there doing business in this state, did unlawfully manufacture, sell and offer to sell a certain compound and preparation, to-wit: Layton's Health Food Baking Powder, which said compound and preparation was so manufactured and sold for the purpose of being used and was intended by said Layton to be used in the preparation of food in which said compound and preparation so manufactured and sold there was alum. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

RICH. M. JOHNSON,

Asst. Pros. Att'y of the St. Louis Court of Crim. Correction.

State of Missouri, } ss.
City of St. Louis, }

Charles J. Bauer, being duly sworn upon his oath says, that the facts stated in the above information are true.

CHAS. J. BAUER.

Sworn to and subscribed before me this 30th day of August, 1899.

ALFRED J. WAGENMAN,

Clerk of the St. Louis Court of Criminal Correction.

(Seal.) By E. S. BARNARD, Deputy Clerk."

Whereupon the State introduced the following stipulation:

State of Missouri, }
City of St. Louis. } ss.

In the St. Louis Court of Criminal Correction.

State of Missouri, Plaintiff,

vs.

Whitney Layton, Defendant.

For the purpose only of the trial of this cause and at said trial the defendant, Whitney Layton, for the stipulation covering a part of the facts in the above entitled case, admits that in the City of St. Louis, Missouri, on the 28th day of August, 1899, he, the defendant, then and there doing business in the State of Missouri, did manufacture, sell and offer to sell to J. M. Houston Grocery Company, then doing business at said city, a certain compound and preparation to-wit: One case containing two dozen, one pound cans of baking powder, known and designated as Layton's Health Food Baking Powder, which said compound and preparation, so manufactured, sold and offered for sale by him for the purpose of its being used and was intended by defendant and by said J. M. Houston Grocer Company to be used in the preparation of food.

Defendant further admits that in said compound and preparation so manufactured, sold and offered to be sold by him there was alum, and that the fact that the same contained alum was then well known to defendant; and it is further agreed and stipulated that at the trial of this case either party may offer any other evidence not inconsistent with the above facts which he may deem material, relevant and competent in the case, subject to objection by the other party to its materiality, relevancy or competency.

STEWART, CUNNINGHAM & ELLIOTT, with
H. A. CLOVER, Jr., Prosecuting Attorney for
Plaintiff.
SEDDON & BLAIR, STANLEY STONER,
Attorneys for defendant."

The case was tried before the judge of the St. Louis Court of Criminal Correction, and after the testimony was submitted and the arguments presented, the Court found the defendant guilty as charged in the information and assessed the penalty at the sum of one hundred dollars.

On the second day of April, 1900, and within four days after the finding and assessment of punishment, defendant filed his motion for a new trial.

And thereafter, to-wit, on the 7th day of April 1900, the Court overruled defendant's motion for a new trial, to which defendant properly excepted, and on the same day, defendant filed his motion in arrest of judgment.

In due time and in proper manner, the defendant perfected his appeal to the Supreme Court of the State of Missouri, and the cause, under the law of the State of Missouri was docketed in Division No. 2 thereof, the same being the criminal division of said Court.

The specific charge of the information was, that the defendant unlawfully manufactured, sold and offered to sell, a certain compound and preparation, for the purpose of its being used, and with intent that it should be used, in the preparation of food, and that said compound and preparation so manufactured and sold contained alum.

At the trial in the lower court defendant confessed the facts to be as charged in the information, but still contended that he was not guilty, and should not be convicted because he said that the statute is unconstitutional. Defendant offered voluminous evidence tending to show details of the manufacture of baking powders of various kinds, and among them of baking powders containing alum, as well as the history of the business of manufacturing, selling and using alum baking powders and tending to prove that that business is now, and for years has been, very extensive in Missouri, and in the United States, and that defendant for some years before the enactment of this statute had been engaged in that business. Also tending to prove that the use of alum in baking powders is wholesome, useful and economical; that most grocers in Missouri kept and sold alum baking powders, and that no

harm had been known to result from their use in the preparation of food.

All this evidence upon objection of the State for incompetency, irrelevancy and immateriality was excluded by the Court.

Defendant asked the Court to give six separate instructions, all of which were predicated upon the admission of the testimony which had been excluded, and in which the Court was asked to declare the law to be that defendant must be acquitted, if the Court, sitting as a jury, found the facts to be as the excluded evidence tended to show. Those instructions are set forth here in the abstract of record following this statement. The theory of all those instructions substantially appears in instruction number 5, which is as follows: "The Court declares the law to be that when a citizen of the State of Missouri is charged with doing an act which he has done in pursuance of a long and well established business in which he is engaged, he cannot be prevented from showing that such business is an innocent one and beneficial to the public by any mere act of the law making power of this State, and the declaration of such law making power in such act that he is engaged in an unlawful business is not conclusive upon this Court of that fact; and it is the duty of this Court to hear the the evidence on the real nature of such business, and of such charge, and to determine for itself such real nature, and declare the law valid or invalid, according to the evidence adduced before it."

All these instructions were refused.

In Missouri Supreme Court the defendant assigned as error:

1st. That the Court erred in ruling out all the evidence which was offered by the defendant in his defense.

2nd. That the Court erred in refusing the instructions which were offered by the defendant.

3rd. That the Court erred in refusing to declare that the law under which the defendant was convicted was unconstitutional and void; and,

4th. That the Court erred in finding against the defendant.

The cause was submitted in the Supreme Court of Missouri, Division No. 2, and on February 26, 1901, the Court handed down an unanimous opinion affirming the judgment of the lower Court.

On the 19th day of February, 1901, the defendant moved Division No. 2 of the Supreme Court of Missouri to order the cause transferred to Court en Banc of the Supreme Court of the State, which motion was overruled.

Subsequently the proper steps were taken to bring the cause to this Court on a writ of error, and the cause is here now for determination.

ABSTRACT OF RECORD.

The following is the information filed in the St. Louis Court of Criminal Correction (omitting Caption):

RICHARD M. JOHNSON, Assistant Prosecuting Attorney, of the St. Louis Court of Criminal Correction, now here in Court, on behalf of the State of Missouri, information makes as follows:

That Whitney Layton, in the City of St. Louis, on the 28th day of August, 1899, then and there doing business in this State, did unlawfully manufacture, sell and offer to sell a certain compound and preparation to-wit: Layton's Health Food Baking Powder, which said compound and preparation was so manufactured and sold for the purpose of being used and was intended by said Layton to be used in the preparation of food in which said compound and preparation so manufactured and sold there was alum. Contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State.

RICH. M. JOHNSON,

Asst. Pros. Att'y of the St. Louis Court of Crim. Correction.

State of Missouri, }
City of St. Louis, } ss.

Charles J. Bauer, being duly sworn upon his oath says, that the facts stated in the above information are true.

CHAS. J. BAUER,

Sworn to and subscribed before me this 30th day of August, 1899.

ALFRED J. WAGENMAN,
Clerk of the St. Louis Court of Criminal Correction.
(Seal.) By E. S. BARNARD, Deputy Clerk.

INSTRUCTIONS.

State of Missouri, Plaintiff,
vs.
Whitney Layton, Defendant.

Instruction No. 1 for the defendant.

The Court declares the law to be that if the Court, sitting as a jury in this case, finds from the evidence that the manufacture and sale of alum baking powders had existed in this state as an independent trade or business for a period of nearly twenty years prior to the 20th day of August, 1899.

That at that time and for many years prior thereto, in this state and in the United States, these powders have been well recognized articles of commerce and such trade had become a well established industry in which large sums of money had been invested and from which large numbers of persons gained their livelihood.

That in this state and the United States such powders were and are generally dealt in by grocers and are largely consumed by the public, and have generally proved themselves to be acceptable to such consumers and were and are in general useful and wholesome adjuncts to be used in the preparation of bread, or other articles of food in the preparation of which they are used.

And that the defendant at the time he sold the can of powder described in the information in this case was and had been long engaged in this trade as his pursuit in life, and sold said can in pursuance of his trade, then the defendant is not guilty of the charge made against him in this case and must be acquitted.

State of Missouri, Plaintiff,

vs.

Whitney Layton, Defendant.

Instruction No. 2 for the defendant.

The Court declares the law to be that if the Court, sitting as a jury in this case, finds from the evidence that the manufacture and sale of alum baking powders had existed in this state as an independent trade or business for a period of nearly twenty years prior to the 20th day of August, 1899.

That at that time and for many years prior thereto, in this state and in the United States, these powders have been well recognized articles of commerce and such trade has become a well established industry in which large sums of money had been invested and from which large numbers of persons gained their livelihood.

That in this state and the United States such powders were and are generally dealt in by grocers and are largely consumed by the public, and have generally proved themselves to be acceptable to such consumers and were and are in general useful and wholesome adjuncts to be used in the preparation of bread and other articles of food in the preparation of which they are used.

And that the defendant at the time he sold the can of powder described in the information in this case was and had been long engaged in this trade as his pursuit in life, and sold said can in the pursuance of his said trade, then the defendant was engaged in a lawful business and was not guilty of a violation of any law of Missouri.

And the fact that the Court, sitting as a jury, may believe from the evidence that from want of skill or from carelessness or from dishonesty, some manufacturers engaged in said trade have at times put upon the market alum baking powders which contain an excess of alum as compared with their bicarbonate of sodium ingredient, or otherwise improperly made, does not render the said trade of the defendant unlawful.

State of Missouri, Plaintiff,

vs.

Whitney Layton, Defendant.

Instruction No. 3 for the defendant.

The Court declares the law to be that if the manufacture and sale of alum baking powder was a well established trade or business in this state at and long prior to the 20th day of August, 1899, and that if such business was in its general nature and scope an innocent business and generally useful and beneficial to the public in a generally useful and wholesome and well recognized article of commerce largely used by and acceptable to the people of Missouri, and that if the defendant had been long engaged in said business as his pursuit in life and manufactured and sold the can of alum baking powder described in the information in this case in the pursuit of his said business, then he is not guilty as charged and must be acquitted.

State of Missouri, Plaintiff,

vs.

Whitney Layton, Defendant.

Instruction No. 4 for the defendant.

The Court declares the law to be that if the manufacture and sale of alum baking powders as a well established trade or business in this state at and long prior to the 20th day of August, 1899, and that if such business was in its general nature and scope an innocent business and generally useful and beneficial to the public and is a generally useful and wholesome and well recognized article of commerce largely used by and acceptable to the people of Missouri, and that if the defendant had been long engaged in said business as his pursuit in life and manufactured and sold the can of alum baking powder described in the information in this case in the pursuit of his said business, then the fact that the Court may believe from the evidence that from want of skill or from carelessness or from dishonesty some manufacturers engaged in said trade, have at times put upon the market some alum baking powders which contain an excess of alum as compared

with their bicarbonate of sodium ingredient or otherwise improperly made, does not render said trade of the defendant unlawful.

State of Missouri, Plaintiff,

vs.

Whitney Layton, Defendant.

Instruction No. 5 for the defendant.

The Court declares the law to be that when a citizen of the state of Missouri is charged with doing an act which he has done in pursuance of a long and well established business in which he is engaged, he can not be prevented from showing that such business is an innocent one and beneficial to the public by any mere act of the law making power of this state, and the declaration of such law making power in such act that he is engaged in an unlawful business is not conclusive upon this Court of that fact, and it is the duty of this Court to hear the evidence on the real nature of such business and of such charge and to determine for itself such real nature and declare the law valid or invalid, according to the evidence adduced before it.

State of Missouri, Plaintiff,

vs.

Whitney Layton, Defendant.

Instruction No. 6 for the defendant.

The Court declares the law to be that if the Court, sitting as a jury, finds from the evidence that at and long prior to the 20th of August, 1899, alum baking powders were well recognized articles of commerce in Missouri, and that such alum baking powders made with ordinary skill when used in cooking with ordinary care, do not cause the food cooked with them to carry any alum into the stomach of the person eating the food, then the defendant is not guilty of the charge made against him in this case and must be acquitted.

All of said instructions were refused by the Court. The defendant duly excepted to all of said rulings.

MOTION FOR NEW TRIAL.

State of Missouri, }
City of St. Louis, } ss.

State of Missouri, Plaintiff,

vs.

Whitney Layton, Defendant.

In the St. Louis Court of Criminal Correction.

Now comes the above named defendant, Whitney Layton, and moves the Court to set aside the verdict and finding of this Court, sitting as a jury made on March 31, 1900, and to grant unto defendant a new trial in this case, and alleges as grounds therefor the following reasons:

I.

The Court erred at the trial in refusing to give legal and proper instructions as to the law asked by the defendant.

II.

The Court erred at the trial in not giving instructions as to the law of its own motion, fully covering the issues in the case.

III.

Because the Court erred in excluding legal, proper and competent testimony, which was offered at the trial by the defendant.

IV.

Because the Court erred in excluding all of the testimony offered by the defendant in his defense at the trial.

V.

Because the Court erred in its ruling that it could hear no testimony on the part of the defendant offered by him for

the purpose of showing that the law under which he was prosecuted, and on which the information in this case was based, was unconstitutional and erred in holding that all of said evidence offered by him for that purpose was immaterial and incompetent.

VI.

Because the Court admitted, on behalf of the plaintiff illegal, improper and incompetent testimony.

VII.

Because the said verdict and finding of the Court, sitting as a jury, is contrary to the law, and also contrary to the evidence and contrary to the weight of the evidence.

VIII.

Because the said verdict and finding of the Court sitting as a jury, is not supported by any evidence.

IX.

Because the Court, under the evidence in the case, in not declaring the statute of Missouri entitled "An Act to prevent the use of unhealthy chemicals or substances in the preparation or manufacture of any article used, or to be used, in the preparation of food," approved May 11, 1899, purporting to prohibit any person or corporation doing business in this State, to manufacture sell, or offer to sell, any article, compound or preparation for the purpose of being used, or which is intended to be used in the preparation of food, in which article, compound or preparation there is alum, to be void in so far as it purported to prohibit the defendant from manufacturing, selling or offering to sell the article described in the information in this case, and the Court erred in declaring the said law to be valid and binding on the defendant in that respect.

X.

Because the verdict and finding of this Court, sitting as a jury, is against the defendant when it should have been in his favor.

SEDDON & BLAIR,
Attorneys for the defendant.

MOTION IN ARREST.

State of Missouri, }
City of St. Louis, } ss.

State of Missouri, Plaintiff,
vs.
Whitney Layton, Defendant.

In the St. Louis Court of Criminal Correction.

Now comes the defendant, Whitney Layton, and moves this Court to arrest the judgment in this case for the following reasons:

First: The facts stated in the information do not constitute a public offense.

Second. The verdict herein is insufficient to sustain a judgment in this case.

SEDDON & BLAIR,
Attorneys for defndant.

And thereafter and on the same day, to-wit, the 7th day of April, 1900, the Court overruled said motion in arrest of judgment. To the action of the Court in so overruling said motion in arrest of judgment, the defendant then and there, at the time of so overruling the same, duly excepted. And thereafter on the said 7th day of April, A. D. 1900, the Court made its order extending the time in which the defendant might file his bill of exceptions to thirty days from the 7th day of April, 1900, which order is as follows (omitting caption):

Now at this day comes defendant by his attorneys and on

his motion the Court orders that he shall have leave to file his bill of exceptions within thirty days from April 7, 1900.

Thereafter and on the same day, to-wit, Saturday, the 7th day of April, 1900, the defendant filed his affidavit for appeal as follows:

State of Missouri
vs.
Whitney Layton.

Charged with manufacturing and selling compounds, etc.

And now comes the defendant in the above entitled cause, who being first duly sworn upon his oath says: That the appeal in the above entitled cause is not made for vexation or delay, but because affiant believes that the appellant is aggrieved by the judgment or decision of the Court.

WHITNEY LAYTON.

Sworn to and subscribed before me, this 7th day of April, 1900.

A. J. WAGENMAN, Clerk."

JUDGMENT.

Now at this day again comes the prosecuting attorney for the State and the defendant in his own proper person also comes. Wherefore it is considered by the Court that the said defendant for said offense and in pursuance of the finding of the Court aforesaid pay to the State of Missouri for the use of the City of St. Louis a fine of $100, together with costs herein accrued. Thereupon again comes the defendant by his attorneys and prays an appeal from the judgment of this Court to the Supreme Court of the State of Missouri, and the Court being of the opinion that there is probable cause for such appeal doth grant the same, and defendant having filed his affidavit for appeal and appeal bond with good and sufficient securities to be approved by the Court, it is ordered by the Court that this appeal shall operate as a supersedeas until this cause shall be heard and determined by the Supreme Court of the State of Missouri.

OPINION OF THE SUPREME COURT OF MISSOURI.

On the 30th day of August, 1899, the Assistant Prosecuting Attorney of the St. Louis Court of Criminal Correction lodged in the St. Louis Court of Criminal Correction the following information against Whitney Layton of said city:

"Richard Johnson, Assistant Prosecuting Attorney, of the St. Louis Court of Criminal Correction, now here in Court, on behalf of the State of Missouri, information makes as follows:

That Whitney Layton in the city of St. Louis, on the 28th day of August, 1899, then and there doing business in this state, did unlawfully manufacture, sell and offer to sell a certain compound and preparation, to-wit: Layton's Health Food Baking Powder, which said compound and preparation was so manufactured and sold for the purpose of being used and was intended by said Layton to be used in the preparation of food in which said compound and preparation so manufactured and sold there was alum. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

RICHARD M. JOHNSON,

Asst. Pros. Att'y of the St. Louis Court of Crim. Correction.

The defendant was arrested and entered his plea of not guilty.

A jury was waived and the cause tried to the Court.

At the trial the State's representative filed and read in evidence the following stipulation:

"State of Missouri

vs.

Whitney Layton."

"For the purpose only of the trial of this cause and at said trial the defendant, Whitney Layton, for a stipulation covering a part of the facts in the above entitled case, admits that in the City of St. Louis, Missouri, on the 28th day of August, 1899, he, the defendant, then and there doing business in the State of Missouri did manufacture, sell and offer

to sell to J. M. Houston Grocer Company then doing business at said city, a certain compound and preparation, to-wit: One case containing two dozen, one pound cans of baking powder, known and designated as Layton's Health Food Baking Powder, which said compound and preparation, so manufactured, sold and offered for sale by him for the purpose of its being used and was intended by defendant and by said J. M. Houston Grocer Company to be used in the preparation of food.

Defendant further admits that in said compound and preparation so manufactured, sold and offered to be sold by him there was alum, and that the fact that the same contained alum was then well known to defendant; and it is further agreed and stipulated that at the trial of this case either party may offer any other evidence not inconsistent with the above facts which he may deem material, relevant and competent in the case, subject to objection by the other party to its materiality, relevancy or competency.

STEWART, CUNNINGHAM & ELIOT, with
H. A. CLOVER, Jr., Prosecuting Attorney, for
Plaintiff.

SEDDON & BLAIR, STANLEY STONER,
Attorneys for defendant."

The prosecution then rested.

The defendant then offered evidence tending to establish the following facts:

Baking powders have been in use for more than fifty years. They are intended to furnish to the people a simple, cheap, efficient and wholesome leavening agent in the cooking of food, as a substitute for yeast, which is very slow and more expensive leavening agent, and one which requires considerable intelligence in the cook to use successfully. All baking powders furnish this leavening agent in the form of carbon dioxide (carbonic acid gas), which is given off from the baking powder in preparing and cooking food. This gas being liberated in the dough, forms bubbles which take permanent form in the baked bread, thus making it light and porous. All baking powders in their essential features are the same. They all supply this leavening agent (dioxide of carbon), by freeing

it from bi-carbonate of soda. They differ in the non-essential manner in which this carbon dioxide is released from the bi-carbonate of soda. There are three classes of baking powders known to commerce, viz: The cream of tartar baking powders, the phosphate baking powders and the alum baking powders.

The cream of tartar powders are composed of bi-carbonate of soda and cream of tartar (bi-tartrate of potassium), mixed with starch as a filler. The soda and cream of tartar are combined in such proportions that when they are united together in the presence of water, in the process of cooking, they react upon each other, and free the carbon dioxide which leavens the bread. The resulting product left in the bread after cooking is Rochelle Salts, a purgative agent.

In the phosphate powders the active agent is the phosphate of calcium which unites with the bi-carbonate of soda and liberates the dioxide of carbon, the leavening agent.

The alum powders, as they do not differ from the cream of tartar powders in the main essential features of a baking powder, to-wit, the liberation of the carbon dioxide from bi-carbonate of sodium, but merely in the non-essential mode of liberating the gas, do not differ from each other essentially. In the phosphate alum powders, phosphate of calcium is used to aid in liberating from the bi-carbonate of soda the gas, the leavening agent, the essential thing.

The straight alum powders are composed of bi-carbonate of soda and a double sulphate salt of sodium and aluminum, which technically is not alum at all but is popularly called soda alum, with starch as a filler or carrier. The alum and the bi-carbonate of soda are mixed in such proportions that in the cooking process the carbon dioxide is released as a leavening agent, as in the case of the cream of tartar baking powders. The resulting products are sulphate of sodium and hydroxide (hydrate) of aluminum.

The evidence of defendant tended to show that none of the products left in the food cooked with alum baking powders are at all injurious to the human system.

The evidence shows that the trade in alum baking powders as a trade has given entire satisfaction to the people. Alum baking powders are nearly as standard an article as flour or sugar. They are to be found upon the shelves of every grocery store, not only in Missouri, but in the United States. They were first introduced about 1870. In spite of the fiercest competition and most hostile rivalry upon the part of manufacturers of cream of tartar powders, who the evidence shows have used every effort to prejudice the mind of the public by every manner of advertisements and representations, the trade rapidly expanded until it has now reached vast proportions. The evidence tended to show that alum baking powders sold in the United States last year amounted to not fewer than 120,000,000 pounds and involved an enormous expenditure in the manufacture and distribution.

The defendant's evidence also tended to show that not only was the particular case of baking powder known as "Layton's Health Food" for the sale of which he was prosecuted, but also *all alum baking powders in general* are and always have been healthful and wholesome adjuncts in the preparation of human food. The evidence tends to show that no one had ever either heard of or had known of, a single case where the health of a single human being had been injured, or had been supposed to have been injured by the use of alum baking powder in the preparation of food, and that the trade in alum baking powders as a trade prior to the passage of this law was an honest and lawful business in a generally harmless and useful preparation used as an adjunct in the cooking of food. The manufacturers and sellers of both such powders, cream of tartar and alum, have been engaged in competition with each other in furnishing to the people from bi-carbonate of soda a leavening agent for cooking bread, cake, etc. They differ only in the non-essential manner of freeing the gas. That the trade in cream of tartar powders has been practically monopolized by the Royal Baking Powder Co. which controls the cream of tartar market.

To all of this evidence counsel for the State objected when it was offered on the ground that in view of the stipula-

tions made between the parties which was read by the State in making its case, all evidence which might be offered by the defendant in his defense would be irrelevant and immaterial.

The Court at the time of the objection announced it would not then rule upon the objection but would hear the evidence subject to such objection and would at the end of the case announce its ruling and if it concluded the objection was well taken would rule out all of such evidence.

On the other hand, the State in rebuttal offered much evidence by distinguished chemists and physicians that alum in the quantities usually used in the preparation of baking powders was and is injurious to the health. That while it assists in liberating the carbonic acid gas and thus makes the bread light, there is a residum of alumina left in the bread which is solvable and enters into the system and acts as an astringent and is deleterious; that there was a general prejudice in the minds of the public against alum powders; that while the sale of alum powders was very enormous people generally were not advised that they were purchasing alum powders.

After all the evidence was in, the Court sustained the objection of the State and excluded all defendant's evidence as irrelevant and immaterial to the issue in the case. To which the defendant duly excepted at the time.

Every item of the evidence offered by defendant was avowedly introduced for the purpose of showing that the statute under which defendant was prosecuted was unconstitutional and void which contention the Court overruled and found defendant guilty. The statute which defendant is charged to have violated is the act of May 11, 1899, and is as follows:

"AN ACT TO PREVENT THE USE OF UNHEALTHY CHEMICALS OR SUBSTANCES IN THE PREPARATION OR MANUFACTURE OF ANY ARTICLE USED OR TO BE USED IN THE PREPARATION OF FOOD."

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. That it shall be unlawful for any person or corporation doing business in this State to manufacture, sell or offer to sell, any article, compound or preparation for the purpose of being used, or which is intended to be used, in the preparation of food, in which article, compound or preparation, there is any arsenic, calomel, bismuth, ammonia or alum.

"Section 2. Any person or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor and shall, upon conviction, be fined not less than one hundred dollars, which shall be paid into and become a part of the road fund of the county in which such fine is collected.

"Approved May 11, 1899. Takes effect August 22nd, 1899."

The defendant asked various declarations of law to the effect that the legislature could not arbitrarily declare his business unlawful which were refused and he saved his exceptions and in due time filed his motions for new trial and in arrest, which were likewise overruled.

As already indicated in the statement of the case the one great question upon this record is the constitutionality of the act of May 11, 1899, making it a misdemeanor in this State "for any person or corporation doing business in this State to manufacture, sell, or offer to sell any article, compound or preparation for the purpose of being used or which is intended to be used, in the preparation of food, in which article, compound or preparation there is any * * * alum."

The act obviously aimed at what is known as "Alum Baking Powders." While the act also condemns the use of arsenic, calomel, bismuth and ammonia in baking powders there is not the slightest evidence that either of these poisons or substances is ever used in the preparation of baking powders in the ordinary trade by reputable dealers and merchants whereas the evidence which the Court heard but finally excluded in making up its verdict and judgment disclosed that alum is and has been for more than a quarter of a century an ingredient in the preparation of baking powders; that baking powders containing alum in some degree are used to an enor-

mous extent; that not less than 120,000,000 pounds of such powders have been sold in the United States in the year next preceding the filing of the information in this case.

The defendant is a manufacturer of a baking powder known as "Layton's Health Food Baking Powder," and after the act of May 11, 1899, if valid, went into effect, sold a case of said baking powder in the city of St. Louis.

The constitutionality of the act is assailed on two grounds. First, that it violates section 28, article 4 of the Constitution of Missouri.

Second. That it conflicts with sections 4 and 30 of Article 2 of the Constitution of Missouri.

It is a trite saying that when the courts are called upon to decide that an act of the Legislature violates the organic law they start with every presumption in favor of the validity of the statute. This much we owe to a co-ordinate branch of the government, upon which the people in the Constitution have conferred the law-making power.

The right and power of the Courts under our peculiar form of government to declare a solemn and formal act of the Legislature invalid arises not out of any supposed or assumed superiority of the judicial department over that of the legislative branch of the government, but is founded upon the fact that the Constitution is the organic law which defines the limitations of all branches of the government and is the supreme law by which the acts of all branches of the government must be tested and in the very nature of things the judiciary must, in performing its functions, determine whether the legislative enactment is in harmony with the supreme law.

Proceeding a step farther it must be conceded that the validity of the act in question must be referable to what we denominate the police power of the State, and that the legislature is clearly the department of the government which is authorized to exercise the police power.

Under forms of government where limitations upon executive and legislative powers do not exist, there are no restrictions upon this necessary function of government, but under

our Federal and State governments limitations are to be found in our written constitutions.

Said the Supreme Court of the United States in Mugler vs. Kansas, 123 U. S., loc. cit. 661: "It does not follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State.

There are of necessity limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, Sinking Fund Cases, 99 U. S., 700-718, the courts must obey the Constitution rather than the law-making department of government and must upon their own responsibility determine whether in any particular case these limits have been passed. "To what purpose," it was said in Marbury vs. Madison, 1 Cranch, 137-176, "are powers limited and to what purpose is that limitation committed to writing, if those limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed and if acts prohibited and acts allowed are of equal obligation."

"The Courts are not bound by mere forms, nor are they to be led by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

Accepting this statement of the rights and duties of the respective departments, we are brought to the contention of the parties to this record.

The defendant insists that the compound prepared by himself and other manufacturers as and for a baking powder

is a perfectly healthful article, that had been in general, indeed universal use in this State and throughout the United States for thirty years. That these so-called alum baking powders have proven acceptable as a common household article, as a most useful adjunct to the cooking process; that during all that time not a single instance had occurred in which a single person had been rendered sick or suffered in health from their use; that they had become so acceptable to the bakers and housewives of the land that their production and sale amounted to 120,000,000 pounds in a single year; that no more objection could be urged against their use as being deleterious than can be and has been urged by vegetarians against the use of meat or by certain persons against the common table salt or the use of wheat bread, and that it is no more liable to adulteration than flour or sugar.

He urges that to strike down this great industry in view of its recognized harmlessness is an arbitrary and unwarranted attempt to exercise the police power of the legislature.

On the other hand, the State insists that Section 4 of our Bill of Rights which provides "that all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government, and that when government does not confer this security it fails of its chief design," and section 30 of the Bill of Rights which ordains "that no person shall be deprived of life, liberty or property, without due process of law," are not infringed by this act. That *"the Constitution does not guarantee to give to any person the right to manufacture or sell any chemical or substance which the legislature has declared to be unhealthy and has forbidden."*

The State's counsel further insist that the judgment of the Criminal Court is in conformity with the decision of this Court in State vs. Addington, 77 Mo., 110, which case they insist involved every essential feature of the case at bar.

In State vs. Addington, supra, the defendant was prosecuted under the statute of this State of March 24, 1881, en-

titled "An Act to prevent the manufacture and sale of oleaginous substances or compounds of the same *in imitation* of the pure dairy products."

In sustaining that statute, this Court stated concisely the ground upon which it rested, as follows:

"The central idea of the Statute before us seems very manifest; it was, in our opinion, the prevention of facilities for selling or manufacturing a *spurious* article of butter, resembling the genuine article so closely in its external appearance as to render it easy to deceive purchasers into buying that which they should not buy but for the deception. The history of legislation on this subject, as well as the phraseology of the act itself very strongly tend to conform this view. If this was the purpose of that enactment we discover nothing in its provisions which enables us to say that the legislature exceeded the power confided to that department of the government and unless we can say this we can not hold the act as being anything less than valid."

Commenting on this decision Tiedemann in his work on "Limitations of Police Power," page 296, says, "But the only valid objection to its sale is the close resemblance to genuine butter and the consequent opportunity for the perpetration of fraud. And this was the sole ground upon which the constitutionality of the law was sustained by the Supreme Court of Missouri."

In State vs. Bockstruck, 136 Mo. 356, State vs. Addington, supra, was reviewed by the same judge who wrote it and as confirming the view taken of that case by Tiedeman. We quote, "We consider that the State has the same right to forbid and punish the manufacture of counterfeit butter that it has to forbid and punish the manufacture *of counterfeit coin.*"

"The like view taken by us of the validity of the act of 1881, in relation to the manufacture or sale of *imitation butter* (State vs. Addington, 77 Mo., 110) though the latter act contained no such provisions as are contained in section 8 of the present act."

It will be observed that the Court dwells in both cases upon the fact that in both acts the evident object and dominat-

ing idea "was to prevent the manufacture or sale of a spurious article of butter" and upon this ground we still have no hesitancy in holding that such legislation is clearly valid.

Such, also, was the ruling in People vs. Arensberg, 105 N. Y. 123, in which the act was entitled "An act to prevent deception in the sale of dairy products," and it was forbidden to sell any article "in imitation or *semblance* or designed to take the place of natural butter."

In State vs. Marx, 99 N. Y. 377, the court of appeals held an act of the legislature invalid which made the manufacture out of any oleaginous substance or compound other than that produced from unadulterated milk and cream, any article *designed to take the place of butter*, etc. Judge Rapallo in the course of the opinion after stating that the evidence disclosed that oleomargarine was a perfectly healthful and pure article of food, says, "One of the learned Judges who delivered opinions at the general term endeavored to sustain the act on the ground that it was intended to prohibit the sale of any artificial compound as genuine butter or cheese made from unadulterated milk or cream. "That it was the *design to deceive* which the law rendered criminal."

"If that were a correct interpretation of the act we should concur with the learned judge in his conclusion as to its validity, but we could not concur in his further view that such an offense was charged in the indictment, or proved on the trial."

"The prohibition is not of the manufacture or sale of an article designed as an *imitation* of dairy butter or cheese or intended to be passed off as such, but of an article designed to take the *place* of dairy butter or cheese." "Simulation of butter is not the act prohibited."

Again the Court says, "It appears to us quite clear that the object and effect of the enactment were not to supplement existing provisions against fraud and deception by means of imitations of dairy butter, but to take a further and bolder step and by absolutely prohibiting the manufacture or sale of any article which could be used as a substitute for it, however openly and fairly the character of the substitute might

be avowed and published, to drive the substituted article from the market and protect those engaged in the manufacture of dairy products against the competition of cheaper substances capable of being applied to the same uses as articles of foods." The Court then asks the question, "Who will have the temerity to say that these constitutional principles are not violated by an enactment which *absolutely prohibits* an important branch of industry for the sole reason that it competes with another and may reduce the price of an article of food for the human race." The Court held that statute unconstitutional.

Judge Dillon in his admirable work on Municipal Corporations (4 ed.) Sec. 141, p. 211, in a note to the text, says: "We can not refrain from expressing our full concurrence in the views and conclusions of the Court of appeals of New York in People vs. Marx." * * *

The Pennsylvania Act of 1885, under which Powell was convicted (Powell vs. Com., 114 Pa. St. 265 and affirmed in 127 U. S. 678) makes the manufacture and sale of oleomargarine, though open and unconcealed, a crime. We cannot but express our regret that the Constitution of any of the states or that of the United States admits of a construction that it is competent for a state legislature to suppress (instead of regulating) under fine and imprisonment, the business of manufacturing and selling a harmless and even wholesome article if the legislature chooses to affirm, contrary to the fact, that the public health or public policy requires such suppression. The record of the conviction of Powell for selling without any deception a healthful and nutritious article of food *makes one's blood tingle.*" At first blush the decisions in the Marx and Addington cases may appear to collide but upon a closer view it will be seen that the court of appeals distinctly assents to the doctrine upon which Judge Sherwood announces the Addington case rests, in speaking of the effort to sustain the New York statute on the ground "that it was intended to prohibit the sale of any artificial compound as genuine butter or cheese made from unadulterated milk or cream; that it was that *design to deceive* which the law rendered criminal." Judge Rapello says, "*If that were a cor-*

rect interpretation of the Act, we should concur as to its validity."

As the oleomargarine Act considered in the Addington case prohibited *imitation* butter, and as this Court held it was valid because it shut the door against the designs to perpetrate fraud the great underlying principle of both cases was the same though the two courts might differ as to the meaning of the words of the two acts.

Does the Act May 11th, making it penal to use alum in the preparation of baking powders, bring it within the reason of State vs. Addington? In the Addington case, there was a recognized standard for the article which the legislature intended to protect against fraudulent imitation, to-wit, natural butter made from pure dairy products or unadulterated milk, and in accordance with our decision in that case we held that statutes enacted to prevent the imposition of a deception upon others are clearly valid. Cook vs. The State, 110 Ala. 40; Stotts vs. Thompson, 44 Minn. 271; State vs. Marshall, 64 N. H. 549; State vs. Newton, 50 N. J. L., 534; Com. vs. Huntley, 156 Mass. 236; State vs. Hogan, 55 Minn. 183.

But the question raised on this record, while a kindred one, is, we conceive, different. It seems to us that in the nature of things there is a wide difference between legislation prohibiting or regulating the manufacture and sale of an article which is manufactured with a design to imitate a standard or superior article, and pass it off on the public, which can not readily detect the imposition, for something different from what it is, and the manufacture and sale of an article which in truth and fact is admitted to be innocuous and healthful, and in general use, and about which there is neither *secrecy* or *imitation* of another article of conceded purity and wholesomeness.

The Addington and similar cases settle the constitutionality of the former but do not reach the latter. As the case at bar does not fall within the reasoning and purview of the Addington case, that case does not reach the difficulty here. The statute upon which this prosecution is based is not based upon the idea of imitation of one article by another.

No baking powder is recognized as the standard as is butter from unadulterated milk in the oleomargarine statute. Here the statute must be upheld if at all, upon the right of the legislature to make all needful laws to preserve the public health.

The right of the State to protect the health, morals and safety of its people by regulations that do not interfere with the execution of the powers of the general government or violate rights secured by the Constitution of the United States is now recognized by all courts in this country.

It is peculiarly a legislative function. While it is true that there are limits under our system to this power we must start with the presumption in favor of the Act. While we do not accede to the proposition that the legislature can arbitrarily declare any article of food in general use and concededly wholesome and innocuous, to be *unhealthy*, and its production and sale, a crime, and would have no hesitancy in declaring such an act void, when the act on its face disclosed its arbitrary and unreasonable character, or where as in the Marx case, 99 N. Y. 377, when such an Act is challenged on such ground it is admitted by the State that the prohibited article is innocuous and beneficial in itself and is not made in imitation of or with a view to deceive the public, but is made and vended without secrecy and without imitation of any other and the only purpose of the law is to prevent competition. Still we find ourselves confronted in this case with a state of facts essentially different from that presented to the court in the Marx case.

While defendant offered much evidence to show that alum baking powders were a useful and harmless preparation there is no gainsaying the fact that the State offered much pertinent testimony to the contrary. That there has long existed a strong prejudice against the use of alum in the making of bread must be conceded. Whether the prejudice is well founded is another matter.

As early as the 37th year of the reign of George the Third, the British parliament absolutely prohibited the use of alum in the making of bread. Stat. 37 Geo. 3, Ch. 98,

Sec. 21, and irrespective of the statute, it was held indictable to use it in large quantities. Rex v. Dixon, 4 Camp. 12. Such seems still to be the statute law of England. Bread Act 1836; I Chitty's Eng. Stats., Title, "Bread" & "Adulteration of Foods."

Several states of our union, while not going to the extreme of our General Assembly, have statutes passed with a view to the protection of the public against these alum powders by requiring that the cans in which they are sold shall give notice that they contain alum, and these acts have been sustained as fairly within the police power of the State. This Court in view of this sharp conflict of testimony as to the noxious and innocuous character of alum baking powders, can not take judicial notice that these powders are a perfectly innocuous preparation.

Under these circumstances then, are we to hold that the court of criminal correction erred in not passing upon the question of fact tendered to him and having found the fact, in not deciding the law, constitutional or unconstitutional accordingly as it appeared to him to be harmful and deleterious or harmless and innoxious? "If so," as was said in People vs. Cipperly, 101 N. Y. 634, affirming 37 Hun. 324 by the court of appeals of New York, the same court which decided the People vs. Marx, 99 N. Y. 377, the Court must charge the jury in each case that if they find milk below that standard, is unwholesome, then the statute is constitutional: if they find it to be unwholesome, then the statute is unconstitutional."

"Evidently a constitutional question cannot be settled or rather unsettled in that way. The constitutionality would vary with the varying judgments of juries." Substitute alum baking powders for milk, and we have the rule applicable to this case. Long before the decision of the court of appeals in that case, however, Judge Leonard of this Court in State vs. Rich, 20 Mo. 396, had said, "If whenever any act done under the authority of the law came in question collaterally, the constitutionality of the law could be contested, then the trial of the main issue must necessarily be delayed until the preliminary fact upon which the validity of the contested

legislative act depended, should be first tried and determined upon testimony which being different in different cases might involve the absurdity of deciding the law constitutional one day and unconstitutional the next." And he held the evidence inadmissible.

What, then, is the test when the constitutionality of an act of the legislature is assailed as invading the right of the citizen to use his faculties in the production of an article for sale for food or drink? We answer that if it be an article so universally conceded to be wholesome and innocuous that the Court may take judicial notice of it, the legislature under the Constitution has no right to absolutely prohibit it, but if there is a dispute as to the fact of its wholesomeness for food or drink, then the legislature can either regulate or prohibit it. The constitutionality of the law is not to be determined upon the question of fact in each case, but the courts determine for themselves upon the fundamental principles of our constitution which vests the legislative power in the general assembly, and the rule of construction adopted by our courts "that an act of the legislature is not to be declared void, unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt." Com. vs. Smith, 4 Bin. (Penn.) 117; Cooley Const. Lim. 6 ed. 216; State vs. Nelson, 39 N. E. Rep., 22.

The cases abound, in the greatest courts, State and Federal, in which this limitation has been set upon their own authority by the greatest judges who have illumined our jurisprudence. Ogden vs. Saunders, 12 Wheat. 213; Sinking Fund Cases, 99 U. S., 700; In re Wellington et al., 16 Pick. 87; Perry vs. Keene, 56 N. H., 514.

In this last case, Ladd, J., said: "Certainly it is not for this Court to shrink from the discharge of a constitutional duty; but at the same time it is not for this branch of the government to set an example of encroachment upon the province of the others. It is only the enunciation of a rule that is now elementary in the American States to say that before we can declare this law unconstitutional we must be

fully satisfied—satisfied beyond a reasonable doubt—that the purpose for which the tax is authorized is private and not public."

Keeping in view this cardinal principle for our guidance how can we say in view of the contradictory evidence as to the effect on the health of bread made with alum baking powders, that the legislature beyond a reasonable doubt transcended its constitutional right in prohibiting the use of alum in bread? We are not authorized to do so.

It may be argued with great force that a statute similar to the Minnesota statute would be sufficient for the protection of purchasers who have a prejudice against these powders; it may be that in the small quantities now used in these alum powders generally it can not be shown that any particular person has ever lost his health from their use, but that the legislature deemed their use deleterious can not be denied, and there is no such conclusive evidence to the contrary as to justify this Court in holding this act, intended for the benefit of the public health, is void. The mere wisdom or unwisdom of the act, is not for us to decide.

The judgment must be and is affirmed.

Sherwood, P. J., and Burgess J., concur.

JAS. B. GANTT, J.

State of Missouri—set.

I, John R. Green, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the opinion of Division No. 2 of said Court, delivered in the foregoing entitled cause, on the 12th day of Feb. 1901, as fully as the same appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of our said Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 23rd day of Feb., 1901.

(Seal.) JOHN R. GREEN, Clerk.

PETITION.

To the Honorable, the Presiding Justice of Division Number Two of the Supreme Court of the State of Missouri:

Your petitioner, Whitney Layton, respectfully shows that on the 12th day of February, A. D. 1901, the Supreme Court of the State of Missouri rendered a certain judgment of affirmance, thereby affirming a judgment of the St. Louis Court of Criminal Correction, rendered on the 31st day of March, 1900, in a certain cause therein pending, wherein the State of Missouri was plaintiff and the petitioner, Whitney Layton, was defendant. That in and by said judgment the said petitioner was found guilty, in the manner and form charged in a certain information filed in said cause, and the penalty assessed against him by the said court was the sum of one hundred dollars ($100), and costs, as will appear by reference to the records and proceedings in said cause.

Your petitioner further shows that the Supreme Court of the State of Missouri is the highest court of said State in which a decision in said cause could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by a writ of error, under the statutes of the United States authorizing writs of error to State courts, because your petitioner states and shows unto the Court as follows:

The Act of the Legislature of the State of Missouri under which the petitioner was convicted, entitled "An Act to prevent the use of unhealthy chemicals or substances in the preparation or manufacture of an article used or to be used in the preparation of food," is void, in that it violates and conflicts with the Fourteenth Amendment to the Constitution of the United States, because

(a) Said Act abridges the privileges and immunities of the said petitioner and of the citizens of the United States.

(b) It deprives the petitioner of his liberty and his property, without due process of law, and

(c) It denies to the petitioner the equal protection of the law.

All of which will more fully and at large appear by the record of the proceedings in said cause, which is herewith submitted.

Wherefore, your petitioner prays the allowance of the writ of error, returnable into the Supreme Court of the United States, and for citation and *supersedeas;* and this he will ever pray, etc.

WHITNEY LAYTON,
Petitioner.

By SEDDON & BLAIR,
Attorneys for Petitioner.

State of Missouri,
City of St. Louis.

Whitney Layton being by me duly sworn on his oath says that the above and foregoing application is not made for vexation or delay but because the affiant believes in sincerity and truth that he is aggrieved by the judgment of this Court in the aforesaid case of State of Missouri, Respondent, vs. Whitney Layton, Appellant, in which he has prayed the said writ of error.

WHITNEY LAYTON.

Subscribed and sworn to before me this 26th day of February, A. D. 1901. My term of office as a notary public expires on the 25th day of October, 1903.

STANLEY STONER,
(Seal) Notary Public.

I certify that in my opinion as one of the attorneys for Whitney Layton that the above application for a writ of error is well founded in law.

JAMES A. SEDDON,
Of Counsel for Whitney Layton.

ASSIGNMENT OF ERRORS.

Comes now Whitney Layton, plaintiff in error by his counsel and respectfully represents that he feels himself to be aggrieved by the proceedings and judgment of the Supreme

Court of the State of Missouri in the above entitled cause and assigns error thereto as follows:

First: That the said Supreme Court of Missouri erred in ruling and holding that the law of the State of Missouri, approved by the Governor thereof on May 11th, 1899, entitled "An act to prevent the use of unhealthy chemicals or substances in the preparation or manufacture of any article used or to be used in the preparation of food" is a valid and constitutional law over the express objection of the defendant Whitney Layton, made in the St. Louis Court of Criminal Correction, the trial Court, and the said Supreme Court of Missouri, that said law is unconstitutional and void in this that it conflicts with that provision of Article Fourteen of the amendments (known as the Fourteenth Amendment) to the Constitution of the United States which provides that no State shall deprive any person of life, liberty or property without due process of law.

Second. That the said Supreme Court of Missouri erred in this, that it ruled and held that said law of the State of Missouri, approved May 11th, 1899, is constitutional and valid over the objection of Whitney Layton made in both said courts that the said law is unconstitutional and void because it conflicts with the provision of the Fourteenth Amendment of the Constitution of the United States which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Third. That the said Supreme Court of Missouri erred in this that under the judgment of the St. Louis Court of Criminal Correction the trial court in this case and under the said judgment of the Supreme Court of Missouri the said Whitney Layton, a citizen of Missouri and of the United States is deprived of his liberty without due process of law in violation of the express provision of Article Fourteen of the amendments (known as the Fourteenth Amendment) to the Constitution of the United States which provides that no state shall deprive any person of life, liberty or property without due process of law, the benefit of which provision the said Whitney Layton set up in both of said courts.

Fourth. The said Supreme Court of Missouri erred in said judgment in this that under the judgment of the said trial court and the said Supreme Court of Missouri, said Whitney Layton, a citizen of the State of Missouri and of the United States, is deprived of the right guaranteed to him by that provision of Article Fourteen of the Amendments (known as the Fourteenth Amendment) to the Constitution of the United States; that he shall not be denied by the State of Missouri within its jurisdiction the equal protection of the laws, the benefit of which right was expressly set up by the said Whitney Layton in both said courts.

Fifth. Because the said Supreme Court of Missouri erred in not holding and ruling that the said trial court erred in refusing to give legal and proper instructions by which said ruling the said lower court directly held that the law of the State of Missouri did not conflict with each and both of said provisions of the said Fourteenth Amendment to the Constitution of the United States the benefit of which was expressly set up as a defense by the said Whitney Layton in both of said courts.

Sixth. Because the said Supreme Court of Missouri erred in not holding that the said trial court erred in overruling the fifth paragraph of the motion for a new trial of the said Whitney Layton in the said lower court, which paragraph is in the following words:

"Because the Court erred in its rulings that it would hear no testimony on the part of the defendant offered by him for the purpose of showing that the law under which he was prosecuted and on which the information in this case was based was unconstitutional and erred in holding that all of said evidence offered by him for that purpose was immaterial and incompetent."

Seventh: Because the Supreme Court of Missouri refused to rule and hold that the said lower court had wrongfully overruled paragraph nine of the motion for a new trial of the said Whitney Layton in the said lower court, which paragraph was as follows:

"Because the Court under the evidence in the case in

not declaring the statute of Missouri entitled "An Act to prevent the use of unhealthy chemicals or substances in the preparation or manufacture of any article used or to be used in the preparation of food," Approved May 11th, 1899, purporting to prohibit any person or corporation doing business in this State to manufacture, sell or offer to sell any article, compound or preparation for the purpose of being used, or which is intended to be used in the preparation of food in which article, compound or preparation there is alum is void in so far that it prohibits the defendant from manufacturing, selling or offering to sell the article described in the information in this case and the Court erred in declaring the said law to be valid and binding on the defendant in that respect by which said ruling the said lower court expressly held that said law of the State of Missouri did not conflict with either of the said provisions of the said Fourteenth Amendment to the Constitution of the United States.

Wherefore, the said Whitney Layton, plaintiff in error, prays this Honorable Court to examine and correct the errors assigned and for a reversal of the judgment of the Supreme Court of the State of Missouri and of the said St. Louis Court of Criminal Correction, entered in the above entitled cause.

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Filed February 27, 1901.

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